Supreme Court, U.S.
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No. 92-977

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

GEORGE LUDDINGTON,
Petitioner,

v.

INDIANA BELL TELEPHONE COMPANY, INCORPORATED,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

Respondent, Indiana Bell Telephone Company ("IBT"),[1] asks this Court to deny George Luddington's ("Luddington") Petition for Writ of Certiorari for the reasons set forth herein.

COUNTERSTATEMENT OF THE CASE

At all times relevant to this case, Luddington was an employee of IBT. His lawsuit alleged that between 1982 and 1986 he pursued promotions or lateral transfers to various jobs and did not receive them or was not considered for them due to a) his race (black) and/or b) retaliation in violation of Title VII of The Civil Rights

[1] Indiana Bell Telephone Company, Incorporated, is a subsidiary of Ameritech Corporation.

Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.* ("Title VII") and 42 U.S.C. § 1981 ("§ 1981"). The number of jobs at issue was 35.

The district court granted IBT's Motion for Summary Judgment on Luddington's claims under both Title VII and § 1981 as to each job. It dismissed all of the Title VII claims, as well as claims under § 1981 with respect to 26 of the jobs, on the merits. The district court dismissed the § 1981 claims on the remaining nine jobs on the basis of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (holding § 1981 covered only claims of discrimination in hiring or contracts that created a new and distinct employment relationship).

Luddington appealed to the Court of Appeals for the Seventh Circuit. While that appeal was pending, the Civil Rights Act of 1991 ("Act"), Pub. L. No. 102-166, 105 Stat. 1071 (1991), was enacted. Section 101 of the Act statutorily overturned the holding in *Patterson*. At the request of the court of appeals, the parties filed supplemental briefs on how the Act affected the appeal. Although the district court dismissed the § 1981 claims on nine of the jobs based on *Patterson*, Luddington had parallel Title VII claims for each of those nine jobs as well. The Title VII claims on four of these nine jobs had been dismissed on their merits. Because the same substantive principles apply under both Title VII and § 1981, *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 568 (7th Cir. 1989), the § 1981 claims on those four jobs also fail on the merits, regardless of *Patterson*. Thus, the Act's passage affected only the district court's ruling on § 1981 claims for five jobs.

The Seventh Circuit affirmed the grant of Summary Judgment to IBT on all of Luddington's claims and found that § 101 of the Act should not be applied retroactively. *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225 (7th Cir. 1992).

SUMMARY OF ARGUMENT

Luddington seeks grant of certiorari claiming a conflict in the circuits on the issue of the Act's retroactivity. However, his arguments are not well-articulated, provide minimal analysis, do not provide a basis for granting the Petition or are incorrect.

Only § 101 of the Act was at issue in this case and no conflict exists among circuits on whether this section should apply to pending cases. All circuits that have examined § 101 have held that it should not be applied retroactively. The Court has already denied certiorari in a case where this was the issue.

While the Seventh and the Ninth Circuits differ on the principle to determine retroactivity (the latter finding the Act retroactive based on its language and the former finding the Act's language inconclusive and using judicial presumptions to find it not retroactive), the case holdings are not inconsistent as to the section of the Act at issue in each case. Under the Seventh Circuit's reasoning, substantive provisions of the Act are not to be applied retroactively, but non-substantive provisions can be applied retroactively. The section at issue in the Seventh Circuit [§ 101] is substantive, and the section at issue in the Ninth Circuit [§ 113] is not substantive.

Even assuming a conflict exists between the Seventh and the Ninth Circuits, the Court should deny the Petition because of the limited scope of this case. It involves only one section of the Act, and the case had already been adjudicated and was on appeal when the Act was enacted. The Act contains numerous sections, and many cases will involve situations where the cases had not been tried when the Act was enacted. Allowing one or more of the remaining circuits the opportunity to address the Act's retroactivity will permit greater illumination on that issue. If the Act's retroactivity is to be addressed by this Court, some case other than this one would be more appropriate for review.

REASONS FOR DENYING THE WRIT

I. LUDDINGTON'S ARGUMENTS ARE NOT CLEARLY ARTICULATED, ARE NOT A BASIS FOR GRANTING THE PETITION OR ARE INCORRECT.

Luddington seeks a grant of certiorari on the basis that a conflict exists in the circuits as to the Act's retroactivity. However, beyond that mere statement there is little analysis, nor is there clear or accurate substantive discussion as to why the Petition should be granted. Rule 24.6 of the Court states that briefs must be, *inter alia*, concise, logically arranged with proper headings and free from burdensome, irrelevant or immaterial matter. One might question whether the Petition meets these requirements.[2]

The Petition's Table of Contents lists three reasons for granting the Writ, only the first of which appears to be discussed in the Petition. Under "Argument," the Table of Contents lists four separate arguments, A through D. However, no such separate subheadings or arguments are in the Petition.

Luddington contends this case is analogous to *Davis v. City of San Francisco*, 976 F.2d 1536 (9th Cir. 1992), because his case was "filed when this Court's ruling decisions held 42 U.S.C. § 1981 provided relief for all forms of employment discrimination based on race"; "the Supreme Court subsequently handed down *Patterson v. McLean* . . . , limiting applications of § 1981 to pre-contract

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[2] The Petition seems to have some of the same failings the Seventh Circuit noted about Luddington's appellate brief. *Luddington*, 966 F.2d at 230 (The court refused to search the record to examine Luddington's claims to determine if they had merit, because to do so would require it to step outside the proper judicial role and act as an auxiliary lawyer for a party to an appeal. The court stated the responsibility for identification, framing and argument of issues was the lawyers', and when an appellant fails to make a minimally complete and comprehensible argument for each of his claims, he loses regardless of the merits of those claims.).

employment decisions based on race" and then Congress passed the Act which overruled *Patterson*. [Petition pp. 15-16.] These points are immaterial to *Davis* which did not involve any § 1981 issues but only the retroactivity of § 113 allowing recovery of expert witness fees under Title VII. Thus, the point of Luddington's analogy is not only unclear, but the analogy is wrong. Luddington proceeds to state that "in *Davis*, the matter of the application of the Civil Rights Act thereto evolved as follows" [Petition p. 16]; however, that thought is never completed, and he moves to a discussion of reasons the Seventh Circuit gave for holding the Act not retroactive.

In addition, Luddington cites arguments that have no bearing on the resolution of whether the Act is to be given retroactive application. For example, citing *McHard v. Louisville* (US S. Ct. 1902), 183 US 43 (*sic*),[3] he contends the judiciary does not have the power to interfere with legislative functions [Petition p. 12]. No one has disputed that point. He also cites *McFaddin v. Evans-Snider-Buel Co.*, 185 U.S. 502 (1902), for the proposition that Congress has the power to pass retroactive laws [Petition p. 22]. Again, no one disputes that point. The issue is did Congress pass a retroactive law, not can it do so. Finally, Luddington cites *United States v. Heinszen & Co.*, 206 U.S. 370 (1907), for the proposition that Congress has the power to pass legislation to cure any lack, irregularity or impotence of existing statutes [Petition p. 23]. Once again, no one disputes this point. In summary, none of these three arguments is relevant to the issue of whether the Act is to be given retroactive application and thus is not a basis to grant the Petition.

On multiple occasions, Luddington discusses the reasoning in his case with respect to penalties. He states that the Seventh Circuit concluded the Act should be applied only prospectively because a defendant should not be sub-

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[3] The correct citation is *McChord v. Louisville & Nashville R.R.*, 183 U.S. 483 (1902).

jected to a civil penalty for conduct it had no reason to believe unlawful before the Act. He contends this is in error because prior to the passage of the Act, other statutes had made it unlawful to discriminate in employment based on race [Petition pp. 13-14]. This misses the mark. The Seventh Circuit's point was that the Act's passage exposed employers to claims not previously cognizable under § 1981. *Luddington*, 966 F.2d at 229. Luddington also argues the Seventh Circuit's reasoning that the Act should not be applied retroactively due to the severity of penalties imposed is wrong because the Act did not increase the level of damages [Petition pp. 14-15]. This again misses the mark. The Seventh Circuit was not talking about liability in terms of dollar amounts, but liability in terms of expanded substantive coverage of the Act. *Id.*

Finally, Luddington argues that the Seventh Circuit erred in its reasoning because prior to the Act no limit on damages existed (citing damage awards in three 42 U.S.C. § 1981 decisions) and the Act put caps on the level of damages, which is favorable to employers [Petition pp. 19-20]. This statement is incorrect. Prior to the passage of the Act, no punitive or compensatory damages were available under Title VII. Since its passage, such damages are available under Title VII, but are capped depending on the size of the employer. However, both before and after the passage of the Act compensatory and punitive damages were available under § 1981. The Act did not limit or restrict recovery of damages under § 1981 and specifically so states [§ 102(b)(4)].

Thus, the Petition should be denied under Rule 14.5 of the Court for failure to present with accuracy and clearness what is essential to a ready and adequate understanding of the points requiring consideration.

II. NO CONFLICT EXISTS AMONG THE CIRCUITS AS TO WHETHER § 101 OF THE ACT SHOULD BE APPLIED RETROACTIVELY AND THE COURT ALREADY HAS DENIED CERTIORARI IN A CASE WHERE THAT WAS THE ISSUE.

In addition to the Seventh Circuit, five other circuit courts of appeal have specifically addressed whether § 101 of the Act should be applied to pending cases. All of these circuits concluded that it should not be applied retroactively. *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370 (11th Cir. 1992); *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886 (D.C. Cir. 1992); *Harvis v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992); and *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992).

Not only is there an absence of a conflict in the circuits as to whether § 101 should be applied retroactively, but this Court already has been presented with the opportunity to address that issue in the Seventh Circuit case that was the predecessor to *Luddington*. It declined to do so. *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (7th Cir.), *cert. denied*, 113 S. Ct. 207 (1992).[4] Because the issue in both cases is the same, the Court should deny this Petition as it did in *Mozee*.

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[4] The Court also has denied certiorari in another case involving the issue of the Act's retroactivity. *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir.), *cert. denied*, 113 S. Ct. 86 (1992).

III. WHILE THE SEVENTH CIRCUIT AND THE NINTH CIRCUIT DECISIONS DIFFER AS TO THE APPROPRIATE LEGAL PRINCIPLE TO APPLY IN DETERMINING THE ACT'S RETROACTIVITY, NO CONFLICT NECESSARILY EXISTS BETWEEN THEIR HOLDINGS AS TO THE PARTICULAR SECTIONS OF THE ACT AT ISSUE IN EACH CASE.

Luddington contends that the Seventh Circuit is in conflict with the Ninth Circuit's decision in *Davis*. The only provision of the Act involved in *Davis* was that allowing for the award of expert witness fees [§ 113]. The issue was whether that section could be applied to a case which had been tried and was pending appeal on the Act's date of enactment.[3] The Ninth Circuit found that the language of the Act made it clear the Act was to be applied to pending cases. *Davis*, 976 F.2d at 1550. While this conclusion differs with that of the Seventh Circuit's *Mozee* and *Luddington* decisions (finding no clear intent from statutory language and applying judicial presumptions), there is not necessarily a conflict in the holdings of these cases as to the applicability of the respective sections at issue.

Only § 101 of the Act is at issue in this case. It substantively expanded 42 U.S.C. § 1981 from covering only claims related to hiring or the creation of a new and distinct employment relationship to covering all claims of employment discrimination. The Seventh Circuit held § 101 should not be applied to cases already adjudicated and on appeal. As noted earlier, this case was not the first in the Seventh Circuit so holding. *Mozee* reached

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[3] *West Virginia Univ. Hosps., Inc. v. Casey*, 111 S. Ct. 1138, 1148 (1991), held that 42 U.S.C. § 1988 (an attorneys' fee provision parallel to 706(k) in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k)) did not permit recovery of expert witness fees. Thus, a party could only recover the standard witness fees avialable under 28 U.S.C. § 1821(b) (currently $40 a day). Therefore, the issue in *Davis* was whether she would recover $40.00 a day for the expert witness or the $12,200 requested.

the same conclusion a month earlier. (The appellate court decided *Luddington* on June 15, 1992, and *Mozee* on May 7, 1992.) Thus, *Luddington* is an application and a further discusison of the *Mozee* holding[6] and must be viewed in conjunction with it. When this is done, the holdings of the Seventh and Ninth Circuits can be analyzed so that they are not in conflict.

In *Mozee*, the Seventh Circuit looked at the language of the Act and its legislative history but did not find any clear intent as to whether its provisions were to be applied retroactively. *Mozee*, 963 F.2d at 932-34. The court then considered judicial presumptions on retroactivity and observed confusion existed among *Bradley v. School Bd.*, 416 U.S. 696 (1974) (finding presumption in favor of retroactivity), *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) (finding presumption against retroactivity), and cases decided after each. The *Mozee* court noted it did not have the authority to choose between the two lines of Supreme Court precedents. It found the *Bowen* presumption against retroactive application to be the appropriate general rule[7] and that *Bradley* could be reconciled with it. *Mozee*, 963 F.2d at 935-36. In doing so, the Seventh Circuit relied on the post-*Bradley*, pre-*Bowen* decision of *Bennett v. New Jersey*, 470 U.S. 632 (1985). *Bennett* held that substantive provisions of amendments to the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. § 241(a), *et seq.*, could not be applied retroac-

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[6] The Seventh Circuit noted it could have disposed of the retroactivity issue simply by citing its *Mozee* decision. *Luddington*, 966 F.2d at 226.

[7] Judge Posner agreed, noting that a component of the traditional concept of the rule of law is the idea that the law should confine its prohibitions and regulations to future conduct, so that persons can conform their conduct to it and thus avoid being punished. He found this concept was not absolute, but it was the right policy for courts to follow in the absence of other guidance. *Luddington*, 966 F.2d at 227-28.

tively. The Third Circuit Court of Appeals had concluded that they could be applied retroactively, citing *Bradley*. However, the *Bennett* Court noted that *Bradley* acknowledged limits to the general principle that a court is to apply the law in effect at the time of its decision. Citing *United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982), it stated that limitation "comports with another venerable rule of statutory interpretation, i.e., that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." *Bennett*, 470 U.S. at 639. The Seventh Circuit, reading *Bradley* as limited by the language in *Bennett*, concluded that the distinction between the *Bradley* and *Bowen* line of cases was that statutory provisions impacting substantive rights and obligations cannot be applied retroactively.[8] *Mozee*, 963 F.2d at 936. This means that *Bradley* stands for the proposition that statutory provisions not impacting substantive rights and obligations can be applied retroactively.

The Act contains numerous provisions on a variety of matters, some of which are substantive and others which are not. Applying the section on expert witness fees involved in *Davis* to a pending case fits the *Bradley* exception to the *Bowen* presumption against retroactivity recognized by the Seventh Circuit. *Bradley* held that retroactively applying a provision for the award of attorneys' fees was appropriate. 416 U.S. at 721. Section 113 of the Act, allowing for the award of expert witness fees, is akin to a provision for the award of attorneys' fees. Thus, if the same issue were before the Seventh Circuit under its *Mozee/Luddington* analysis, § 113 (a provision not affecting substantitve rights) could be applied to pending cases, which was the holding in *Davis*.

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[8] Other circuits have relied on *Bennett* to reconcile *Bradley* and *Bowen* in a similar manner. *See Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 898-99 (D.C. Cir. 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1374 (5th Cir. 1992).

Therefore, the holding of *Davis* that § 113 allowing recovery of expert witness fees can be applied to pending cases is not in conflict with the holdings in *Mozee* and *Luddington* that § 101 substantively expanding the scope of § 1981 cannot be applied to pending cases. Each conclusion is consistent under the Seventh Circuit's reconciliation of *Bowen* and *Bradley*. Thus, there is no conflict "on the same matter." Supreme Court Rule 10.1(a).

IV. IF A CONFLICT EXISTS BETWEEN DECISIONS OF THE SEVENTH CIRCUIT AND THE NINTH CIRCUIT, THAT DOES NOT NECESSARILY MEAN THE COURT SHOULD GRANT THE PETITION.

A. The Court often denies Petitions when a conflict exists in the circuits.

While existence of a conflict between circuit courts of appeal can be a basis for granting a Petition for Writ of Certiorari, that does not mean the Court is required to accept this case for review. The Court frequently has denied certiorari when the Petitions were based on a conflict in the circuits. *See, e.g., Walker v. United States*, 113 S. Ct. 443 (1992) (Justices White and Blackmun dissenting) (certiroari denied despite a split in the circuits, and the Court had declined to review the same issue on three prior occasions); *Beaulieu v. United States*, 110 S. Ct. 3302 (1990) (Justice White dissenting and noting 48 instances during that term when Petitions based on circuit splits had been denied) (certiorari denied, despite a split in the circuits on the issue of reliance on co-conspirators' testimony for purposes of sentencing); *Brown Transport Corp. v. Atcon, Inc.*, 439 U.S. 1014 (1978), and cases cited therein (Justices White and Blackmun dissenting) (certiorari denied, despite a split in the circuits, on the issue of whether the failure of a common carrier to comply with the time limits of the Interstate Commerce Commission regulations estops it from collecting

freight charges from the shipper). Thus, granting the Petition is not required.[9]

B. Only one of numerous sections of the Act is at issue in this case, and other decisions involving a broader range of sections would be more appropriate to review than this one.

The Act contains numerous provisions, covering a variety of subjects. These include: expanding the substantive scope of 42 U.S.C. § 1981 [§ 101]; allowing recovery of compensatory and punitive damages for intentional discrimination under Title VII [§ 102]; allowing trial by jury under Title VII in cases of intentional discrimination [§ 102]; setting forth the burden of proof in disparate impact cases under Title VII [§ 105]; prohibiting the adjustment of scores, the use of different cutoff scores or otherwise altering the results of employment-related tests on the basis of race, color, religion, sex or national origin [§ 106]; providing that an unlawful employment practice is established if a plaintiff demonstrates that race, color, religion, sex or national origin was a motivating factor even though other factors also motivated the practice and identifying the available remedies in such circumstances [§ 107]; specifying under what circumstances a person may challenge an employment practice that implements or is within the scope of a litigated or consent judgment [§ 108]; extending coverage of Title VII to United States citizens in foreign countries [§109]; setting forth when the limitations period begins to run when challenges are made to allegedly discriminatory seniority systems [§ 112]; permitting the award of expert witness fees under Title VII [§ 113]; extending the limitations period in actions against the federal government [§ 114]; requir-

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[9] The issue of the Act's retroactivity will, after a period of time, become moot and, therefore, will affect a finite number of cases. The Court should not devote its limited resources to this type of case.

ing individuals who wish to bring an action under the Age Discrimination in Employment Act of 1967 to do so within 90 days after receipt of a notice that their complaint has been dismissed or otherwise terminated by the EEOC [§ 115]; and establishing rights for government employees including prohibitions against discrimination [§ 301, *et seq.*].

The issue in *Luddington* only involves whether one section of the Act [§ 101] should be applied retroactively. As noted earlier, no conflict exists between or among circuits on this specific issue. There are many other sections of the Act, and different results might obtain based on which particular section or sections are at issue. The Court should not grant this Petition. If the Court deems it necessary to address the Act's retroactivity, a case involving a broader range of sections would likely be more appropriate.

C. The context in which this case arose is narrow, and other decisions would be more appropriate to review than this one.

The issue in *Luddington*, as well as in the Ninth Circuit's *Davis* decision, is limited to whether one section of the Act should be applied to a case that has been adjudicated and was on appeal on the Act's date of enactment. A substantial number of cases have arisen or will arise under other fact patterns, such as cases tried after the effective date but i) filed before the Act's effective date and arising from conduct occurring before that date; ii) filed after the Act's effective date and arising from conduct occurring before that date; or iii) filed either before or after the Act's effective date and arising out of conduct that straddles the effective date. The Seventh Circuit noted in a subsequent case that *Luddington* left open the question of the Act's retroactivity to cases like these. *Banas v. American Airlines*, 969 F.2d 477, 484-85 (7th Cir. 1992). The Court may find it more appropriate to

wait until a Petition comes before it in which the case had not been adjudicated as of the Act's date of enactment.

D. Allowing one or more of the remaining five circuits the opportunity to address the Act's retroactivity could provide greater illumination of that issue.

Seven circuits have addressed the issue of the Act's retroactivity, but only one (*Davis*) has found that any of its sections should be applied retroactively based on its language. The remaining six circuits have not found the statute's language so abundantly clear (*see* cases cited *supra* p. 7). They based their conclusions that provisions of the Act should not apply retroactively on a review of its legislative history and/or application of judicial presumptions.

The Court should consider waiting until one or more of the remaining five circuits also rule on this issue. Those circuits likely will address the Ninth Circuit's *Davis* decision as well as the decisions of the other circuits. This will permit the opportunity for greater illumination on the issue of the Act's retroactivity if it needs to be resolved by the Court.

CONCLUSION

Luddington contends certiorari should be granted because of a conflict in the circuits as to the Act's retroactivity. However, he does so with little analysis and with arguments that are not articulated, are not the basis for granting a Petition or are incorrect.

Each circuit that has addressed § 101 of the Act has concluded that it should not be applied retroactively. Thus, the Seventh Circuit's decision in this case is not in conflict with any other circuit, and the Court already has denied certiorari in the Seventh Circuit case that is the predecessor to *Luddington*.

While the Ninth Circuit and the Seventh Circuit decisions differ as to the appropriate legal principle to apply in determining whether a statute is retroactive, the cases can be analyzed in a manner that the holdings are consistent.

Even assuming a conflict exists, the Court is not required to grant the Petition. It frequently denies Petitions that are based on splits in the circuit courts of appeal. Furthermore, the issue in both this case and the Ninth Circuit *Davis* case is limited to one specific section of the Act, and both decisions are limited to cases that had been adjudicated and were on appeal when the Act became effective. The Court should consider allowing other circuits who have not addressed the issue the opportunity to do so to provide more illumination on the issue. If the Court is to address the Act's retroactivity, future cases likely will be better suited for a grant of a Petition for Certiorari.

Respectfully submitted,

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